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No. 89-1679

SUPREME COURT, U.S.

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In The
Supreme Court of the United States
October Term, 1990

SUMMIT HEALTH, LTD., ET AL.,

Petitioners,

vs.

SIMON J. PINHAS, M.D.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

J. MARK WAXMAN*
TAMI S. SMASON
WEISSBURG AND ARONSON, INC.
Attorneys at Law
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(213) 277-2223
Counsel for Petitioners

*Counsel of Record

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I. THE ALLEGATIONS OF THE FIRST AMENDED COMPLAINT ARE INSUFFICIENT TO INVOKE SHERMAN ACT JURISDICTION

The issue before the Court is the validity of the dismissal of a Sherman Act claim which, with respect to jurisdiction, alleges only that each of the parties is or has been engaged in interstate commerce. J.A. 2-6. Petitioner contends that jurisdiction under Section 1 of the Sherman Act exists only where an alleged conspiracy itself is "in restraint of trade or commerce among the several States" (15 U.S.C. § 1) or, as that provision of the Sherman Act has been interpreted in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and other cases, where the alleged conspiracy has been determined to have a substantial effect on interstate commerce as a matter of practical economics. See, e.g., *McLain*, 444 U.S. at 246. The First Amended Complaint fails to plead the requisites for Sherman Act jurisdiction under either the plain language of the statute or its interpretation by the Court.

Respondent argues that Sherman Act jurisdiction should be invoked because "the peer review process in general indisputably affects interstate commerce." Respondent's Brief at 27.¹ To support this argument,

¹ The complaint fails to identify a relevant market allegedly affected by the defendants' alleged conspiracy, but both respondent and the Ninth Circuit have focused on peer review as the activity in question. The United States, in its brief amicus curiae, appears to argue that the relevant

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however, respondent does not cite a single allegation of the First Amended Complaint, as there is no allegation that peer review has any effect on interstate commerce. Moreover, such a broad factual assertion would be incorrect. As amici curiae hospital associations explain, peer review activities may or may not substantially affect interstate commerce, depending on the type of peer review activity and the facts of each case. Hospital Association Brief at 9-10. Similarly, as Clark C. Havighurst, co-author of the amicus brief of Richard A. Bolt, M.D., supporting respondent, has recognized: "it may easily be doubted that the exclusion of a single applicant from the staff of a single hospital has any significant bearing upon either interstate trade or consumer welfare, the focus of federal antitrust law." C. HAVIGHURST, HEALTH CARE LAW AND POLICY, at 674 (1988).

The allegations of the First Amended Complaint fail to support the Ninth Circuit's holding that Sherman Act jurisdiction exists in this case because peer review affects interstate commerce. The complaint itself contains no such allegations, and an understanding of the nature of peer review activity and Professor Havighurst's observation compel the opposite conclusion. The Ninth Circuit's ruling was erroneous, and should be reversed.

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market is either "hospital ophthalmological services in general or those of this hospital" (U.S. Brief at 17 n.9), but such a contention is not properly before this Court. Neither of these potential markets is alleged in the complaint. The issue before this Court, therefore, is solely whether allegations that the parties generally are engaged in interstate commerce are sufficient to invoke Sherman Act jurisdiction.

II. THE PROPOSED "CLASS OF ACTIVITIES" AND "LINE OF COMMERCE" TESTS ARE INCONSISTENT WITH SECTION 1 OF THE SHERMAN ACT AND CASE LAW DETERMINING ITS JURISDICTIONAL SCOPE

The United States proposes tests for finding Sherman Act jurisdiction which are described as "a class of economic activities" test (U.S. Brief at 12) and a "line of business" test (U.S. Brief at 14), but the United States does not define either test or provide guidance as to how either would be applied to the allegations of a particular complaint. The First Amended Complaint in this case contains no allegations of a class of economic activities or line of commerce affected by the alleged conspiracy which affects interstate commerce. It does not, as the United States argues, identify "ophthalmological services" as such a class of activities. U.S. Brief at 6. Nor does the allegation that Summit Health, Midway Hospital's parent corporation, owns hospitals in other states (J.A. 3), logically imply that ophthalmological services affect interstate commerce, as the United States asserts. U.S. Brief at 6. There are no allegations that the ophthalmological services at Midway affect ophthalmological services, or any other services, at any other hospital owned by Summit. Thus, the United States applies the proposed tests to the allegations of the complaint before this Court by first reaching its conclusion that interstate commerce is substantially affected, and then speculating as to facts and a potential class of economic activities which respondent may be able to allege (but did not). The tests do not provide any guidance, but are instead used as devices to eliminate any jurisdictional requisites.

The tests proposed by the government would also ignore the statutory language of Section 1 and its interpretation by this Court in numerous prior decisions. In *McLain*, *Hospital Building Co.*, *Goldfarb* and the precedents upon which those cases are based, the Court has interpreted the Section 1 prohibition against conspiracies "in restraint of trade or commerce among the several States . . ." by focusing on the alleged restraint itself and its effects or potential effects on interstate commerce, based on the record (which in this case is limited to the allegations of the First Amended Complaint), to determine whether Sherman Act jurisdiction exists.² Under the United States' proposed tests, in *Goldfarb* it would have been unnecessary for the Court to examine the relationship between examinations of land titles and out-of-state financing to conclude that price-fixing by attorneys conducting title examinations would substantially affect interstate commerce. Instead, legal services in general

² In *McLain*, for example, the Court conducted a detailed review of the evidentiary record, including the dollar amounts and types of interstate commerce potentially affected by the alleged price-fixing conspiracy. *McLain*, 444 U.S. at 237-239. In *Hospital Building Co.*, the Court analyzed the specific allegations of the effect of blocking the hospital's expansion on various enumerated aspects of interstate commerce, such as management fees paid to an out-of-state corporation and multimillion-dollar financing from out of state. 425 U.S. at 744. In *Goldfarb*, the Court reviewed the nature of the alleged price-fixing conspiracy (421 U.S. at 775-779) and the relationship between examinations of land title and out-of-state financing, including the district court's findings of fact that a title examination is a prerequisite to financing, and that a "significant" portion of the financing for Fairfax County homes comes from out of state (421 U.S. at 783-785).

would be viewed as a "line of business" which, in the aggregate, clearly affects interstate commerce. The entire factual and practical economic analysis undertaken by the Court in *Goldfarb* would have been superfluous. Moreover, the Court would have been incorrect in stating "[o]f course, . . . there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman act." *Goldfarb*, 421 U.S. at 785-786. Under the United States' view, legal services would be considered a "class" of activities, without regard to the facts of a particular case, to determine whether Sherman Act jurisdiction applies.

In *Hospital Building Co.*, under the United States' proposed tests, the Court's analysis of the potential effects on interstate commerce of an alleged attempt to block a hospital's expansion was superfluous, and the Court's statement that Sherman Act jurisdiction applies "[a]s long as the restraint in question substantially and adversely affects interstate commerce" (425 U.S. at 743) was dictum. The fact that a hospital's "line of business," or the "class of activities" consisting of provision of health care services generally, affects interstate commerce, would have been sufficient to apply Sherman Act jurisdiction.

In none of these cases would the Court have been required to discuss, let alone analyze, the interstate commerce implications of the alleged restraint. All that would have been required would have been identification of a "line of business," as broad as necessary, which was in some way involved in the underlying case. Because every line of business, considered in the aggregate, or as part of some other "class of activities," (U.S. Brief at 14) affects

interstate commerce, it is difficult to envision any commercial activity, no matter how local, which would be outside the reach of the Sherman Act under the proposed tests.

For example, employees claiming wrongful termination could file Sherman Act claims on the theory that the employer's line of business affects interstate commerce (*but see Daley v. St. Agnes Hospital*, 490 F.Supp. 1309 (E.D. Pa. 1980) (no Sherman Act jurisdiction in claim against hospitals for conspiring to terminate nurse)), and street vendors could claim that their line of business is in a class of activities affecting interstate tourism in order to bring their local grievances within the Sherman Act (*but see Huelsman v. Civic Center Corp.*, 873 F.2d 1171 (8th Cir. 1989) (unemployed street vendors' claims not within Sherman Act jurisdiction)). No grievance, no matter how small or how local, would fall outside the jurisdictional boundaries of the Sherman Act under the United States' proposed tests.

The fallacy of the United States' argument is that it fails to distinguish between classes of activities which Congress can regulate pursuant to the Commerce Clause and the enforcement of laws in a particular case. This Court has recognized that "the jurisdictional inquiry under . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974) (citations omitted).

The recognition that the Congressional definition of activities which affect interstate commerce for the purpose of regulation is different from the definition for the purpose of enforcement is not unique to jurisdictional determinations under the antitrust laws. The Seventh Circuit, *en banc*, has noted that a statute which applies to a class of activities which affects interstate commerce (in that case, the statute at issue was the Hobbs Act, 18 U.S.C. § 1951), does not allow a court to conclude that "Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case." *United States v. Staszczuk*, 517 F.2d 53, 59 n.16 (7th Cir.) (Stevens, J.), *cert. denied*, 423 U.S. 837 (1975).

The United States argues that requiring that the allegedly anticompetitive conduct affect interstate commerce "would unjustifiably impair antitrust enforcement efforts" (U.S. Brief at 14), but has failed to cite a single case or situation in which antitrust enforcement efforts have been impaired under the existing Sherman Act jurisdictional standards, and therefore cannot justify expansion of Sherman Act jurisdiction in the manner it suggests.³

³ Similarly, the states which filed an amicus brief supporting respondent argue that without expansion of Sherman Act jurisdiction to purely local activities, "certain violations essentially local in nature might be left unredressed" because of alleged gaps in state laws, such as those affecting unilateral monopolization (States' Brief at 9-10). States are free, however, to prohibit local anticompetitive conduct they wish to prohibit.

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III. UNDER ANY TEST, THE HOLDING OF THE NINTH CIRCUIT IN THIS CASE MUST BE REVERSED

The briefs in this case suggest several tests for finding Sherman Act jurisdiction: (1) petitioners contend that the statutory language of Section 1, as interpreted by *McLain* and other precedents, requires that the allegedly anticompetitive conduct substantially affect interstate commerce; (2) respondent argues that the Ninth Circuit properly applied the "infected activity" test, concluding that peer review is the infected activity and that it "indisputably" affects interstate commerce (Respondent's Brief at 11, 27); and (3) the United States proposes that courts examine the relationship between interstate commerce and either a class of economic activities or a line of business out of which the alleged anticompetitive activity arises, such that Sherman Act jurisdiction for private enforcement purposes would be identical to Congress' power to regulate commerce under the Commerce Clause. Under each test, the Ninth Circuit holding must be reversed.

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Moreover, many of the states which are alleged to have gaps in their antitrust laws have unfair competition laws which could be applied to the conduct in question. *See, e.g.*, MONT. CODE ANN. § 30-14-205 (1989) (prohibiting a person from, *inter alia*, creating a monopoly); N.C. GEN. STAT. § 75-1.1 (1988) (prohibiting unfair methods of competition); OKLA. STAT. ANN. tit. 79, § 1 (West 1987) (prohibiting "every act" in restraint of trade or commerce); S.C. CODE § 39-5-20 (1985) (prohibiting unfair methods of competition).

The first Amended Complaint does not allege that interstate commerce was or would have been affected by the exclusion of Dr. Pinhas from Midway's medical staff, as would be required under the standard urged by petitioners. It also fails to allege that peer review affects interstate commerce, as would be required by respondent's proposed test. The Ninth Circuit's finding that peer review does affect interstate commerce is unsupported by the record and, as discussed in the Hospital Association brief, is incorrect. Hospital Association Brief at 9-10. Finally, the First Amended Complaint does not identify any class of economic activities which would give rise to Sherman Act jurisdiction in this case under the test proposed by the United States. The provision of hospital services is not affected, and is not alleged to be affected, in a not insubstantial manner by the peer review decision rendered against Dr. Pinhas nor by peer review proceedings in general conducted at Midway. Thus, the allegations of the First Amended Complaint are insufficient to satisfy any of the proposed tests, and the Ninth Circuit's holding must be reversed.

IV. CONCLUSION

Section 1 of the Sherman Act prohibits only those contracts, combinations and conspiracies "in restraint of trade or commerce among the several states. . . ." While the statute has been construed to prohibit conspiracies which do not directly restrain interstate commerce, but nevertheless substantially affect interstate commerce, respondent and the United States argue that the alleged conspiracy need not have any effect, direct or indirect, substantial or otherwise, on interstate commerce. This is

contrary to the plain language of the statute and nearly a century of judicial interpretation of that statute. However, even under the tests proposed by respondent and the United States, the First Amended Complaint fails to plead the requisites for Sherman Act jurisdiction.

Under any analysis, the Ninth Circuit holding that the allegations of the First Amended Complaint are sufficient to invoke Sherman Act jurisdiction must be reversed, and the district court dismissal of the First Amended Complaint should be affirmed.

Respectfully submitted this 18th
day of October, 1990

J. MARK WAXMAN
TAMI S. SMASON
WEISSBURG AND ARONSON, INC.
Attorneys at Law
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(213) 277-2223
Counsel for Petitioners